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EXAMINER

KASZTEJNA, MATTHEW JOHN

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CARL KAORU SAKAMOTO

Appeal 2009-002714¹
Application 10/777,293
Technology Center 3700

Decided: August 31, 2009

Before TONI R. SCHEINER, DEMETRA J. MILLS, and FRANCISCO C.
PRATS, *Administrative Patent Judges*.

PRATS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a laryngoscope blade. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm-in-part.

¹ Carl Kaoru Sakamoto is the real party in interest.

STATEMENT OF THE CASE

Claims 1-31 are pending and on appeal (App. Br. 1). Claims 1 and 22 are representative of the appealed subject matter and read as follows:

1. A laryngoscope blade comprising:
 - a main blade portion having a posterior surface, a distal end and proximal end, the main blade portion being relatively straight between the distal end and the proximal end;
 - a blade tip extending from the distal end of the main blade portion, the blade tip having a width that is flared wider in a first direction than a width of the main blade portion, the blade tip further being at a select angle with relation to the posterior surface of the main blade portion;
 - a first tongue displacement plate coupled to the main blade portion along a length of the blade;
 - a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion, wherein the second tongue displacement plate and the first tongue displacement plate are adapted to work together to displace a patient's tongue during use of the laryngoscope, the second tongue displacement plate having at least one rounded corner; and
 - a blade base coupled to the proximal end of the blade, wherein the relatively straight main blade portion extends from the blade base at generally a right angle.

22. A laryngoscope blade, the blade comprising:
 - a main blade portion having a posterior surface, a distal end and a proximal end, the posterior surface having a length that is generally straight from the proximal end to the distal end;
 - a blade tip extending from the distal end of the main blade portion, the blade tip further extending beyond a width of the main blade portion from a first side of the main blade portion, the blade tip further extending from the posterior surface of the main blade portion at a select angle;
 - a first tongue displacement plate extending from a second side of the main blade portion at generally a right angle, the

first tongue displacement portion further extending along a select length of the main blade portion proximate the distal end of the main blade portion;

a second tongue displacement plate extending from the first displacement plate at generally a right angle, the second displacement plate further extending from the first displacement plate in a direction that is generally away from the main blade portion, the second tongue displacement plate further having a surface that is positioned in an opposite direction as the posterior surface of the main blade, the surface of the second tongue displacement plate forming a plane that is generally parallel with an axis formed by the length of the posterior surface; and

a blade base coupled to the proximal end of the main blade portion, wherein the generally straight length of the posterior surface extends from the blade base at generally a right angle.

The Examiner cites the following documents as evidence of unpatentability:

Roberts	US 5,406,941	Apr. 18, 1995
Sakamoto	US 6,095,972	Aug. 1, 2000
Cartledge et al.	US 6,623,425 B2	Sep. 23, 2003

Claims 1-31 stand rejected under 35 U.S.C. § 103(a) as being obvious in view of Cartledge, Sakamoto, and Roberts (Ans. 4-7).

OBVIOUSNESS

ISSUE

The Examiner cites Cartledge as disclosing a laryngoscope blade that has a number of the claimed features, including “a first tongue displacement plate (not labeled in figures) coupled to the main blade portion along a length of the blade; a second tongue displacement plate 345 extending from the first tongue displacement plate in a direction that is away from the main

blade portion (see Fig. 7)” (Ans. 4). The Examiner concedes, however, that Cartledge is “is silent with respect to wherein the blade tip having a width that is flared wider in a first direction than a width of the main blade portion” (*id.* at 5).

To meet that limitation, the Examiner cites Sakamoto as teaching an analogous laryngoscope that has a “blade tip 12 [which] is flared wider in a first direction than a width of the main blade portion” (*id.*). Based on these teachings, the Examiner concludes that an ordinary artisan would have considered it obvious to “flare the blade tip in the apparatus of Cartledge et al. to give the tip more surface area to spread apart a patient’s throat tissue and to stabilize the epiglottis while displacing it anteriorly as taught by Sakamoto (se[e] Col. 2, lines 50- 60)” (*id.*).

The Examiner also concedes that Cartledge is “silent with respect to wherein the relatively straight main blade portion extends from the blade base at generally a right angle” (*id.*). To meet that limitation the Examiner cites Roberts as disclosing an analogous laryngoscope that has a blade adjustable to either a straight or a curved surface, depending on the physician’s preference (*id.*). From these teachings, the Examiner concludes that an ordinary artisan would have considered it obvious “to have the blade extend at a right angle from the blade base in the apparatus of Cartledge et al. to better accommodate different pharyngeal configurations of various patients as taught by Roberts” (*id.* at 6-7).

Appellant contends that the Examiner erred in finding that Cartledge meets the limitation in claim 1 requiring the blade to have a “main blade portion being relatively straight between the distal end and the proximal end” (App. Br. 8; *see also* Reply Br. 2). Specifically, Appellant argues, the

“main blade portion of the laryngoscope blade of the Cartledge et al. reference is curved like a Macintosh blade” (App. Br. 8 (citing Cartledge, Figures 3 and 4)).

Moreover, Appellant argues, “[l]ike the traditional Macintosh blade the second tongue displacement of the Cartledge [sic] et al. reference extends away from the main blade portion” (*id.* (citing Cartledge, Figure 3)). The Examiner responds that the main blade portion of Cartledge’s laryngoscope “is clearly straight between a distal end and a proximal end as viewed from a bird’s eye view, or down the barrel of the handle. The blade *must* be straight between its distal and proximal ends to enable passage within a patient’s throat, as seen in Figure 11” (Ans. 8).

Appellant further contends that an ordinary artisan would not have considered it obvious to “combine ‘main blade portion being relatively straight between the distal end and the proximal end’ with ‘a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion,’ as is claimed in claim 1 of the present application” (App. Br. 9). Specifically, Appellant argues, neither Cartledge nor Sakamoto would have suggested “that a modification of what has traditionally been used for decades in the art was needed” (*id.*; *see also* Reply Br. 2). Moreover, Appellant argues, Roberts “does not cure this defect. The Roberts reference merely relates to a single laryngoscope that can be shaped the way the practitioner wants it, curved or straight. However, no tongue displacement plates are used. Hence, the Roberts reference does not teach or suggest the use of tongue displacement plates” (App. Br. 9).

Appellant further contends that claim 1's combination of a "main blade portion being relatively straight between the distal end and the proximal end' with 'a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion,' . . . is an un-predictable result" (*id.*). Specifically, Appellant argues:

[I]t would be predicable to one skilled in the art that a curved blade would have a tongue displacement plate extending away from the main blade portion and that a straight blade would have a tongue displacement plate curved under the main blade portion as is traditionally done but the arrangement as set out in claim 1 is not predictable and hence patentable.
(*Id.*)

In view of the positions advanced by Appellant and the Examiner, the issues with respect to this rejection are whether the Examiner erred in finding that Cartledge meets the limitation requiring the laryngoscope blade to have "a main blade portion having a posterior surface, a distal end and proximal end, the main blade portion being relatively straight between the distal end and the proximal end," and whether the Examiner erred in finding that the cited references suggest a laryngoscope blade that has both a "main blade portion being relatively straight between the distal end and the proximal end" and "a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion."

FINDINGS OF FACT ("FF")

1. Appellant's Figure 1 is reproduced below:

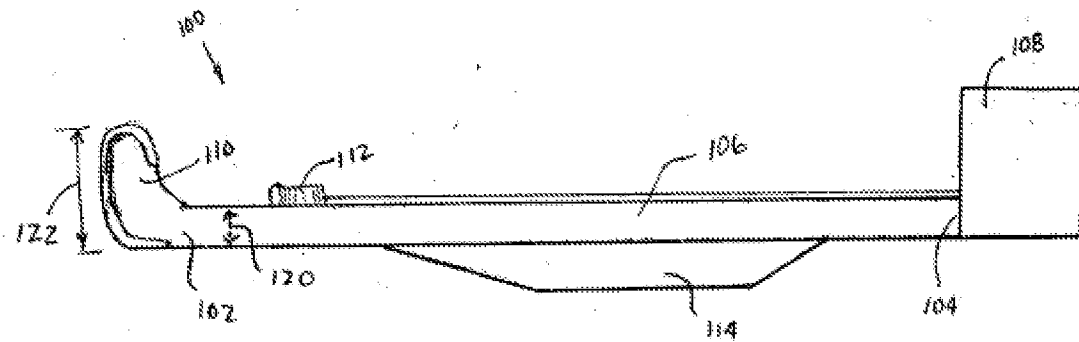


FIG. 1

Figure 1 illustrates a top view of one embodiment of a laryngoscope blade 100 of the present [invention] As illustrated, this embodiment includes a main blade portion 106, a blade base 108 and a blade tip 110. Also illustrated is a light source 112 coupled to the main blade portion 106. The blade tip 110 extends from the distal end 102 of the main blade portion 106. As illustrated, the blade tip 110 is flared out beyond a width 120 of the main blade portion 106. The blade tip 110 having a width 122 that extends beyond the width 120 of the blade 106 allows for a slimmer blade than is typically used in the prior art which adds in the maneuverability of the blade 100 during use. Moreover, the relatively thin main blade portion 106 allows for better vis[i]bility than a standard blade and also provides for greater space for larger endotracheal tubes such as double lumen endotracheal tubes for single lung ventilation. The blade base 108 extends from a proximal end 104 of the main blade portion 106. In this embodiment, a second tongue displacement plate 114 extends out from an opposite side of the main blade portion 106 as the blade tip 110. The second tongue displacement plate 114 is adapted to displace a patient[']s tongue during use.

(Spec. [0022].)

2. Appellant's Figure 2 is reproduced below:

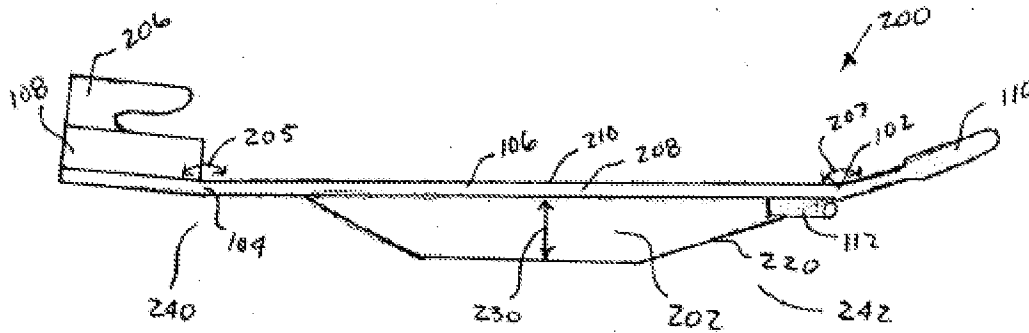


FIG. 2

Figure 2 shows:

[A] side view of another embodiment of a laryngoscope blade 200 of the present invention is illustrated. The blade 200 has a proximal end 104, a main blade portion 106 which has a mid portion 208 and a distal end 102. Figure 2 illustrates that the blade base 108 includes a handle connector portion 206 which is adapted to selectively couple to a standard laryngoscope handle. Also illustrated is a first tongue displacement plate 202 that extends down from the main blade portion 106. The first tongue displacement plate 202 extends along a length of the main blade portion 106.

(Spec. [0023].)

3. Appellant's Figure 3 is reproduced below:

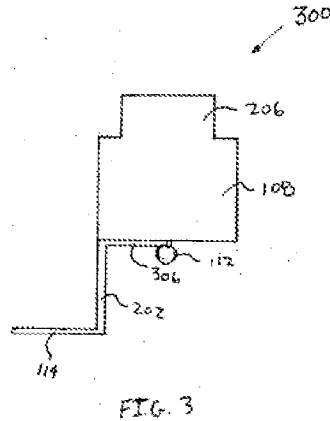


Figure 3 illustrates a back view of a laryngoscope blade 300 of one embodiment of the present invention. As illustrated, the blade base 108 includes a handle connection portion 206. In this embodiment, a connection plate 306 couples a main blade portion 106 to the blade base 108. Also illustrated in Figure 3 are the first tongue displacement plate 202 and the second tongue displacement plate 114. As illustrated, in this embodiment, the second tongue displacement plate 114 is coupled to extend away from the first tongue displacement plate 202 in a direction that is away from the main blade portion 106. Moreover, the second tongue displacement plate 114 is coupled to a side of the first tongue displacement plate 202 that is opposite the side the first tongue displacement plate 202 is coupled to the main blade portion 106. In addition, as illustrated in this embodiment, the second tongue displacement plate 114 extends away from the first tongue displacement plate at generally a perpendicular angle. The first tongue displacement plate 202 and the second tongue displacement plate 114 are adapted to work together the move the tongue of the patient out of the way during use of the laryngoscope 300.

(Spec. [0025].)

4. In its background section, Cartledge discusses prior art types of laryngoscope blades:

Three types of blades are most prominently used. An example of a first type of blade, characterized as a curved blade, is

known in the art as the MacIntosh blade. The MacIntosh blade is advanced into the space between the base of the tongue and the pharyngeal surface of the epiglottis. Forward and upward movement of this blade stretches the hypoepiglottic ligament to cause the epiglottis to move upward to expose the glottic opening. Two other types of prominently used blades are the straight blade, known as the Jackson or Wisconsin blade, and the straight blade with a curved tip, known in the art as the Miller blade. The tip of these blades are passed beneath the laryngeal surface of the epiglottis and moved upwardly to elevate the epiglottis, thereby exposing the glottic opening. (Cartledge, col. 2, ll. 2-15.)

4. To address the potential problem of damaging teeth during the use of laryngoscope blades, Cartledge discloses “a modified laryngoscope blade with a removable protective insert that is designed to reduce the risk of dental injuries in the course of endotracheal intubation in patients” (*id.* at col. 3, ll. 47-50).

5. Cartledge discloses that “the protective insert is preferably constructed of a resilient, pliable material that would maintain its structural integrity, but would absorb and diffuse mechanical stress that might be imparted to the teeth or other body structures at risk with a completely rigid blade” (*id.* at col. 6, ll. 13-17).

6. Cartledge discloses that the “inventive blade may be provided in both straight and curved embodiments, and may incorporate fiberoptic carriers, a distal miniature lamp for illumination, or other ancillary features whether visually oriented or not” (*id.* at col. 3, ll. 53-56).

7. Figure 5 of Cartledge is reproduced below:

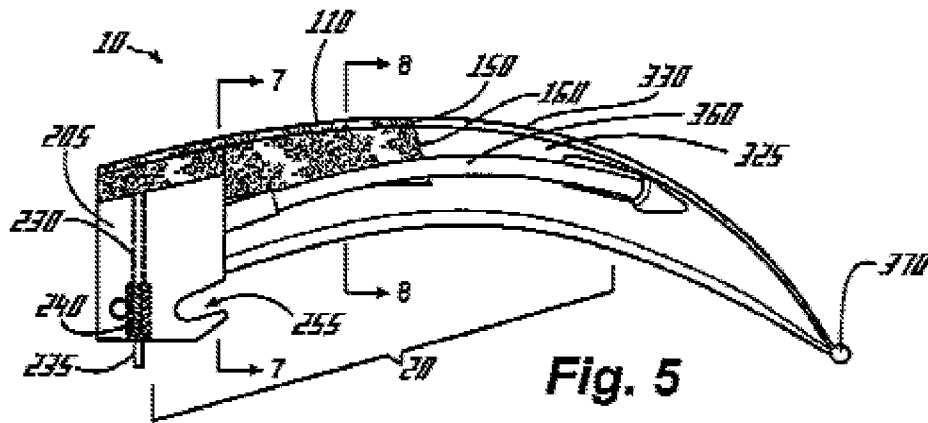


FIG. 5 shows details of the buccal, or lateral side view of the inventive blade assembly The insert 10 is shown fully seated into the recess 25 in the blade structure 20. The distal edge 160 of the vertical blade portion 150 is flushly abutted with the corresponding edge of the vertical blade 325 of the blade structure 20. Also, the maxillary or upper surface 110 of the removable protective insert 10 is substantially flush with the upper surface 330 of the modified blade structure 20.

(Cartledge, col. 7, l. 66, through col. 8, l. 7.)

8. Figure 8 of Cartledge is reproduced below:

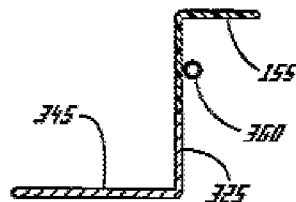


Fig. 8

“FIG. 8 shows a cross-sectional view through the inventive laryngoscope blade assembly 100 through the plane 8-8' on FIG. 5. This shows the seamless junction of the vertical blade 150 of the insert 10 and the vertical blade 325 of the blade structure 20” (Cartledge, col. 9, ll. 1-5).

9. Regarding Figure 8, Cartledge also states:

It should be noted that both the vertical blade 150 of the insert 10 and the vertical blade 325 of the blade structure 20 are relatively thin at this level, minimizing both mechanical and visual obstruction for the user who must both inspect the larynx distal to this level and be able to pass an endotracheal tube or other instrumentation around the inventive laryngoscope blade 100 at or below the level shown.

(*Id.* at col. 9, ll. 5-12.)

10. Sakamoto discloses a laryngoscope in which “the width of the distal aspects of the blade tips are flared out beyond the width of the blade. This design gives the tips more surface area to spread apart a patient’s throat tissue and to stabilize the epiglottis while displacing it anteriorly”

(Sakamoto, col. 2, ll. 52-55).

11. In addition, Sakamoto discloses, “the widening of the blade at its distal end allows for the width of the rest of the blade to be narrower which enhances the maneuverability of laryngoscope and provides the operator with greater exposure of the aditus of larynx/vocal cords” (*id.* at col. 2, ll. 55-59).

12. Roberts discloses “a laryngoscope which has a blade that can be adjusted between a straight surface and a curved surface” (Roberts, col. 1, ll. 10-11).

13. Roberts discloses that,

Depending upon the preference of the physician/anesthesiologist, the laryngoscope used may have a straight blade or a curved blade. In some instances, the physician/anesthesiologist may use both types as well as laryngoscopes having blades of varying length so as to be able to accommodate different pharyngeal configurations of various patients.

(*Id.* at col. 1, ll. 20-26.)

14. Roberts discloses that its device can be interconverted from a relatively straight blade to a relatively curved one by a rotating a cam that forces the blade to bend to various degrees (*id.* at col. 2, ll. 53-64; *see also* Figures 1, 4, and 6).

PRINCIPLES OF LAW

When evaluating whether a claim extends to obvious subject matter, the PTO must interpret the claim's terms using "the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

However, "while 'the specification [should be used] to interpret the meaning of a claim,' courts must not 'import[] limitations from the specification into the claim.' . . . [I]t is improper to 'confin[e] the claims to th[e] embodiments' found in the specification" *In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1299 (Fed. Cir. 2007) (quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005), citations omitted, bracketed text in internal quotes in original); *see also Sjolund v. Musland*, 847 F.2d 1573, 1581 (Fed. Cir. 1988) ("[W]hile it is true that claims are to be interpreted *in light of* the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims."); *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) ("Absent claim language carrying a narrow meaning, the PTO should only

limit the claim based on the specification . . . when [it] expressly disclaim[s] the broader definition.”).

Moreover, as stated in *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989), “during patent prosecution when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.”

In *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007), the Supreme Court pointed out that “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” Rather, the Court stated:

[I]t can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements *in the way the claimed new invention does* . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

Id. at 418-419 (emphasis added).

While it recognized the importance of providing a rationale for practicing the claimed subject matter, the Court nonetheless reaffirmed that “when a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *Id.* at 417 (quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976)). The Court reasoned that:

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this

leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.

Id. at 421.

The Court also noted that the analysis under 35 U.S.C. § 103 properly “take[s] account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *Id.* at 418; *see also id.* at 421 (“A person of ordinary skill is . . . a person of ordinary creativity, not an automaton.”).

The Court further noted that “[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning. Rigid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it.” *Id.* at 421 (citations omitted).

ANALYSIS

Appellant’s arguments do not persuade us that the Examiner erred in finding that Cartledge meets the limitation requiring the laryngoscope blade to have “a main blade portion having a posterior surface, a distal end and proximal end, the main blade portion being relatively straight between the distal end and the proximal end.” Nor are we persuaded that the Examiner erred in finding that the cited references suggest a laryngoscope blade that has both a “main blade portion being relatively straight between the distal end and the proximal end” and “a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion.”

We acknowledge that claim 1 requires the laryngoscope blade to have a main blade portion that is “relatively straight between the distal end and the proximal end.” We also acknowledge that the Specification discloses a blade with a straight main portion 106 (*see* FF 1).

As noted above, the Examiner must give the claims their broadest reasonable interpretation consistent with the Specification, and consistent with an ordinary artisan’s understanding of the claims’ terms. *In re Morris*, 127 F.3d at 1054. The Examiner may not, however, read limitations into the claims from the Specification. *See, e.g., In re Trans Texas Holdings Corp.*, 498 F.3d at 1299.

Thus, by its terms, claim 1 does not require the main blade to be straight, only “relatively straight.” The Specification, in turn, does not define the term “relatively straight,” nor does the Specification indicate how much curvature or bending is encompassed by the claim, or how much is excluded.

Moreover, the Specification does not state the basis for comparison when interpreting the term “relatively.” Also, while the main blade portion of claim 1 must extend from a proximal end to a distal end, at which point the tip begins, neither claim 1 nor the Specification requires the main blade portion or the tip to be a specific percentage of the total length of the blade.

Given the lack of a definition of the term “relatively,” and the manner of that term’s use in claim 1, we do not agree that the Examiner erred in finding that an ordinary artisan would consider Cartledge’s blade to be encompassed by claim 1 when the claim is given its broadest reasonable interpretation consistent with the Specification. Rather, we conclude that the

term “relatively straight” encompasses main blade portions that are somewhat curved, like Cartledge’s.

In the instant case, as the Examiner points out, and Appellant does not dispute, Cartledge’s blade is in fact straight when viewed from above (*see, e.g.,* FF 8). Moreover, even when viewed from the side, an ordinary artisan could reasonably conclude that the portion 20 identified by Cartledge as “the blade structure” (FF 5), while somewhat curved, is in fact “relatively straight” when compared to more curved blades, and particularly when compared to the greater curvature of the overall structure of Cartledge’s blade.

We acknowledge Cartledge’s disclosure that MacIntosh blades are considered “curved” (FF 4). However, as discussed above, the language “relatively straight” does not exclude all curved blades. Also, Appellant points to nothing in the Specification suggesting that the language at issue excludes MacIntosh blades.

In sum, we do not agree with Appellant that the language “relatively straight” is sufficient to distinguish the laryngoscope blade of claim 1 from the slightly curved blade disclosed by Cartledge. We are therefore not persuaded that the Examiner erred in finding that Cartledge meets the limitation requiring the laryngoscope blade to have “a main blade portion having a posterior surface, a distal end and proximal end, the main blade portion being relatively straight between the distal end and the proximal end.”

Claim 1 also recites a laryngoscope blade that has both a “main blade portion being relatively straight between the distal end and the proximal end” and “a second tongue displacement plate extending from the first

tongue displacement plate in a direction that is away from the main blade portion.” As discussed above, we agree with the Examiner that the main portion of Cartledge’s blade is encompassed by the recitation “relatively straight.”

Appellant’s Figure 3 shows an embodiment having the first and second tongue displacement plates configured as recited in claim 1, with first tongue displacement plate 202 extending downwardly and second tongue displacement plate 114 extending at right angles from the first plate (FF 3). As seen in Cartledge’s Figure 8, Cartledge’s tongue displacement plates are configured in the same orientation as shown in Appellant’s Figure 3, with first tongue displacement plate 325 extending downwardly, and second tongue displacement plate 345 extending away from the main blade portion 155 (FF 8).

We therefore do not agree with Appellant that the Examiner erred in finding that the cited references suggest a laryngoscope blade that has both a “main blade portion being relatively straight between the distal end and the proximal end” and “a second tongue displacement plate extending from the first tongue displacement plate in a direction that is away from the main blade portion.” Nor has Appellant pointed to any specific evidence demonstrating that an ordinary artisan would have failed to combine the various features of different types of laryngoscope blades.

To the contrary, Cartledge explicitly discloses that its tooth-saving insert is applicable to either curved or straight blades (FF 6). Moreover, Roberts discloses a laryngoscope that has the same features whether it is curved or straight (FF 12-14). In view of these teachings, an ordinary artisan would reasonably infer that features applied to one type of laryngoscope

would be suitably applied to other types of laryngoscopes. We are therefore not convinced that an ordinary artisan constructing one type of laryngoscope would ignore teachings directed to advantageous features found on other types.

Moreover, although Appellant urges that the combination of elements recited in the claims is unpredictable, Appellant points to no evidence showing that the claimed laryngoscope blade produces any sort of result which an ordinary artisan would have considered unexpected. It is well settled that argument of counsel is no substitute for actual evidence. *In re Cole*, 326 F.2d 769, 773, (CCPA 1964); *In re Geisler*, 116 F.3d 1465, 1471 (Fed. Cir. 1997).

In sum, a preponderance of the evidence shows that the laryngoscope blade recited in claim 1 is merely a combination of elements known to be suitably applied to laryngoscope blades. A preponderance of the evidence also shows that those elements function in a predictable manner.

We are therefore not persuaded that the Examiner erred in concluding that the laryngoscope recited in claim 1 would have been obvious to an artisan of ordinary skill, and accordingly affirm the Examiner's rejection of claim 1. Because they were not argued separately, claims 2-12 fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Appellant argues that claims 13, 27, and 28 also recite the limitations requiring a relatively straight blade main portion combined with a second tongue displacement plate extending from a second end of the first tongue displacement plate in a direction away from the main displacement blade. Therefore, Appellant argues, the arguments put forth regarding claim 1 also

apply to claim 13 (App. Br. 10-11; *see also id.* at 14, 15 (same argument with respect to claims 27 and 28 respectively)).

For the reason discussed above, we do not find Appellant's arguments persuasive. We therefore affirm the Examiner's rejection of claims 13, 27, and 28, and their dependent claims.

In arguing claim 22, Appellant reiterates the argument made with respect to claim 1, and also argues:

[C]laim 22 further includes the aspects of "the second tongue displacement plate further having a surface that is positioned in an opposite direction as the posterior surface of the main blade, the surface of the second tongue displacement plate forming a plane that is generally parallel with an axis formed by the length of the posterior surface." None of the cited references teach or suggest this aspect in combination with the other aspects of claim 22. Moreover, the Examiner has failed to address this aspect in the rejection of claim 22.

(App. Br. 12.)

In reviewing the record, it does not appear that the Examiner addressed these features of claim 22 in the Final Rejection (*see generally* Final Rejection mailed April 19, 2007). However, in the Examiner's Answer, the Examiner states:

Cartledge et al. also disclose the second tongue displacement plate further having a surface that is positioned in an opposite direction as the posterior surface of the main blade, the surface of the second tongue displacement plate forming a plane that is generally parallel with an axis formed by the length of the posterior surface (see Figs. 6-8).

(Ans. 4-5.)

In the Reply Brief Appellant again argues that “[n]one of the cited references teach or suggest this aspect in combination with the other aspects of claim 22” (Reply Br. 3).

We note that the Examiner’s Answer replies to Appellant’s assertion by pointing to Figures 6-8 of Cartledge. However, the Examiner has not explained which elements shown in those Figures correspond to the limitations argued by Appellant, nor is it apparent to us how the Figures meet the limitations at issue.

As the Supreme Court noted in *KSR*, “rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, *there must be some articulated reasoning* with some rational underpinning to support the legal conclusion of obviousness.” *KSR*, 550 U.S. at 418 (quoting *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

Because the Examiner has not adequately articulated the rationale used in concluding that claim 22 would have been obvious over the cited references, we are constrained to reverse the Examiner’s obviousness rejection of that claim, and its dependents.

SUMMARY

We affirm the Examiner’s rejection of claims 1-21 and 27-31 under 35 U.S.C. § 103(a) as being obvious in view of Cartledge, Sakamoto, and Roberts.

However, we reverse the Examiner’s obviousness rejection of claims 22-26 over those references.

Appeal 2009-002714
Application 10/777,293

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

cdc

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